



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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March 20, 2017

Melissa Dreyfus
Standards and Health Protection Division
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: EPA Draft Chapter 3 language for the Water Quality Standards Handbook

Dear Ms. Dreyfus:

Thank you for the opportunity to review EPA's 2017 *Draft Chapter 3* of the EPA *Water Quality Standards Handbook*, provided to states on February 22, 2017 via ACWA. The Washington State Department of Ecology (Ecology) appreciates EPA's extension of the original 7-day period for review to the current March 24 2017 date, and also commends the EPA for acting quickly on this extension when the request was received from ACWA. Ecology's comments on the draft are below.

Overall comment and recommendation:

Ecology appreciates the substantial amount of work that EPA must have done to produce this revision to Chapter 3. This chapter of the Handbook is important to states because it helps inform the basis of criteria development and adoption at the state level. However, Ecology is concerned about the timing of this effort, the prescriptive tone of the text, and the removal of information that is important to states as they consider criteria development. Examples of this (and some additional concerns) are discussed below. To successfully address the concerns we have provided here as well as issues and recommendations from other states, substantial changes to the current draft will be necessary. States should be able to see and comment on those changes prior to finalization. Therefore, Ecology requests that EPA provide at least one more draft of this chapter for review by states before publishing. Specific comments are below.

Prescriptive tone:

The tone of this draft has changed substantially from the existing chapter. Chapter 3 seems to be quite prescriptive, and as such may be interpreted to be requirements of criteria development instead of guidance.



This approach by EPA seems to be a disturbing trend and should not be reinforced in the Handbook. EPA should be clear in the Handbook where and how it is depending on policy or guidance (which are not rule), and where and how it is depending on law and regulation.

Timing of the request for review and the proposed publication date, given ongoing actions:

Page 16 of the draft references EPA's Revision of Certain Federal Water Quality Criteria Applicable to Washington (2016), the EPA's Promulgation of Certain Federal Water Quality Standards Applicable to Maine (2016), and the EPA's February 2, 2015 and March 16, 2015 WQS decision letters to the Maine Department of Environmental Protection. Both of these cases are currently undergoing either litigation, or, review by EPA. Since these issues are not settled it seems premature for EPA to refer to the regulations in the draft guidance, or to base the guidance on circumstances that could change. Until the petitions and lawsuit are formally concluded EPA should not reference the two documents or include in the Handbook policy recommendations and/or interpretations based on them.

Imbalance in how criteria are treated:

The section in the draft addressing human health criteria spans pages 8 - 18 out of a 30 page document. Other important criteria (recreational, aquatic life, nutrient, bio-criteria, flow, sediment, temperature, wildlife, and wetlands) are addressed on pages 18 - 28. There seems to be a large imbalance in the types of material provided for states in this draft. Ecology assumes this is because of the recent interest associated with human health criteria, but we caution that current events should not sway the Handbook from its current balance of necessary guidance.

Much of the material in the human health section of the draft is already found in EPA's extensive and publicly reviewed 2000 human health methodology guidance, and should not need to be duplicated in the Handbook. If EPA thinks this level of detail (equations and inputs discussion) is necessary to include in the guidance, Ecology recommends that EPA also provide equivalent detail (equations and inputs discussion) for the other types of criteria addressed in the guidance. For example, the discussion on the risk level variable in the human health criteria section should be mirrored by; a discussion of the risk of illnesses associated with EPA's recommended recreational criteria and what was considered in that decision, the taxa-specific risk of effects to aquatic life associated with EPA's recommended aquatic life criteria (as developed using the current guidelines and newer approaches), and similar discussions for the other types of criteria.

Site specific criteria – general comment:

This section (starting on page 20 of the draft) indicates that site-specific criteria can only be used for aquatic life criteria. This is misleading. 40 CFR 131.11 (b)(1)(ii), the citation included in this section of the draft, does not limit the applicability of site-specific criteria to only aquatic life criteria:

“40 CFR 131.11

(b) *Form of criteria: In establishing criteria, States should:*

(1) *Establish numerical values based on:*

(i) *304(a) Guidance; or*

(ii) *304(a) Guidance modified to reflect site-specific conditions; or...*”

Ecology strongly recommends that EPA remove the site specific criteria sub-section from the aquatic life criteria section and treat it as a stand-alone discussion. The discussion should address all the criteria types (e.g., human health, biocriteria, and toxics criteria, etc.), and should make clear the scope of 40 CFR 131.11 (b)(1)(ii).

Removal of text that informs states of their options:

In a side-by-side comparison of the information contained in the current Chapter 3 and in the draft revised Chapter 3, it appears that the current chapter was not revised, but was instead put aside and rewritten from the beginning. Ecology agrees it is reasonable to revise current guidance materials to align with new legal decisions, changes to regulations, or changes to EPA policy. However, the EPA should not remove existing Chapter 3 language that is still relevant and useful for states to implement their water quality standards programs. One example of such a removal is the guidance on how to choose which priority toxic pollutants to adopt criteria for (pages 16 – 24 of existing chapter) and its replacement with the abbreviated guidance on pages 28 - 29 of the draft. A second example is guidance on where states have primary authority on levels of protection (page 2 of existing guidance), which was not included in the revised Chapter. In fact, nowhere in the draft document is primary authority or primacy of the states mentioned at all, and this is a major component of the co-regulator relationship between states and the EPA. This should be explicitly acknowledged. In light of the extensive loss of material in the new draft (more than just the two items described were lost from the 54 page current chapter) we recommend that EPA return to the existing Chapter 3, retain information that is still relevant and informative in that chapter, and only edit where changes in law, regulation, or policy have occurred.

Triennial Review:

EPA's new water quality standards language at 40 CFR 131.20 allows states to choose not to adopt a CWA section 304(a) criteria recommendation provided states submit an explanation to the Regional Administrator consistent with CWA section 303(c)(1). This language is not included in the draft, and instead the draft seems to prescriptively indicate that states must adopt all EPA - recommended 304(a) criteria when a triennial review occurs. Ecology recommends this language be expanded to address the full text of the new regulation.

Prescriptive new language on water quality assessment:

The last paragraph of page 3 of the new draft prescriptively directs states on how to make impairment decisions. This language is inappropriate for this chapter which is focused on criteria, not assessment. The current chapter (page 16), when discussing associated material, addresses independent applicability and mentions attainment and non-attainment in a much more objective fashion, and this should be retained in the revision. Policies on water quality assessment are developed by states following the CWA and CFR regulations and the Integrated Report guidance developed by the EPA. Inclusion of this new language here is inappropriate, and assessment information is better addressed through the IR guidance revision process.

The comments above are not exhaustive, but instead highlight some of the main concerns, with examples, that Ecology has with the current draft.

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If the current draft is revised and then sent out again for review by the states, hopefully the number and magnitude of concerns will be minimal, and the next state review and final revisions by EPA can be a much simpler task.

Thank you for your attention to these comments. If you have any questions please contact Cheryl Niemi at (360) 407-6440.

Sincerely,

A handwritten signature in black ink, appearing to read 'Melissa Gildersleeve', with a stylized, cursive script.

Melissa Gildersleeve, Section Manager
Water Quality Program